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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 585

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PETITIONER,

vs.

JAMES M. BORUM, RESPONDENT.

PETITIONER'S REPLY BRIEF.

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The often repeated assertion in respondent's brief that, according to Minnesota practice, the award of the arbitrators must be sustained if there is any evidence to support it, might prove misleading. It is true that findings of fact by arbitrators must be sustained if based on evidence. We do not question their findings of fact, but rely on them. Our contention is that the law was misapplied to those indisputable facts. The Minnesota Supreme Court held that, in a statutory arbitration such as this, the decision of the arbitrators on a question of law is not final (R. 261, 262). That decision as to Minnesota practice will be accepted by this Court.

Respondent's brief claims that he was guilty of no fraud

or misrepresentation of his age, thus seeking to make this case resemble that of *M. P. R. Co. vs. Guillory,* 283 U. S. 849, where the jury made a special finding that Guillory did not misrepresent his age and this Court denied certiorari.

That the present respondent did misstate his age is expressly admitted (Br. 28). But the brief argues that there was no "real misrepresentation" (p. 28) because petitioner knew it was a misstatement. It declares (p. 25):

> "There was *evidence* in the case which would justify a finding that there was no misrepresentation on the part of Borum, the company knowing that his 'railroad age' and his actual age differed greatly." (Emphasis ours.)

To support that assertion the brief sets forth certain portions of respondent's testimony wherein he claimed that petitioner knew he was misstating his age, ignoring petitioner's evidence to the contrary.

That betrays a failure to understand that cases are not tried here *de novo.* This Court will not consider the evidence to determine whether it *might* justify other findings of fact than those which were actually made. We recognize that we should not detain this Court with a rehearsal of our evidence demolishing respondent's claim and fully supporting the arbitrators' findings of fact.

But the assertion that the arbitrators made a finding of fact supporting respondent's claim cannot be ignored. The brief declares (p. 24) that:

> "We have a finding here by the arbitrators that there was no such fraud as to deprive Borum of his status as an employe—in other words, no misrepresentation."

On the contrary, the arbitrators made positive findings against respondent, embracing the essential elements of

fraud. That, being 49, he gave his age as 38, "knowing such statement to be untrue" and "for the purpose of securing employment in disregard of the rule" which he "understood that the defendant had" (R. 192, 199, 200). That his evidence to show petitioner's knowledge of his age was "so unsatisfactory" that they could base no finding thereon (R. 192). That his "knowingly false statement" was "relied upon" and formed, in part, the "basis" on which he was employed (R. 192, 200). The District Court affirmed those findings of fact (R. 212). The Supreme Court affirmed them in affirming the judgment of the District Court (R. 269).

Thus the arbitrators' award was *not* based upon any finding that respondent was guilty of no fraud or misrepresentation. It *was* based on their finding that, under the "thirty day rule," at the end of that time, his status "became fixed as an employe" and he then became "immune from discharge on anything in connection with his application" (R. 193, 194).

The District Court expressly recognized respondent's *fraud*, but rejected the thirty day rule as a basis for condoning it (R. 213), preferring to do so on the ground that it was not against public policy, declaring that there were no

> "circumstances connected with his *fraud* that would render a right of recovery herein abhorrent to public policy" (R. 216). (Emphasis ours.)

The statement in the majority opinion of the Supreme Court that petitioner "just about knew that his (respondent's) age was suspicious" (R. 265) does not suffice to negative his fraud, the arbitrators' findings being affirmed in affirming the judgment of the District Court (R. 269). The opinion set forth indiscriminately all the suggested

theories for sustaining respondent's recovery, without selecting any particular one for approval. But it recognized that respondent had done *wrong*, even when it emphasized (as though legally significant) the fact that he did so to get a job, referring to his "falsification of his age to get a job" (R. 269) and declaring that:

> "His wrong was in misrepresenting his age to get a job" (R. 268).

Thus respondent's *wrongful* misrepresentation of his age was established and recognized in all the Courts below.

Utterly groundless is the assertion at page 5 of respondent's brief that the arbitrators' original finding No. 9 (R. 192) (that respondent's evidence to show that petitioner knew his true age was too unsatisfactory to support a finding) was *superseded* by their supplemental finding No. 2 (R. 199) (which did not deal with petitioner's knowledge of respondent's age).

The assertion at page 6 that if respondent "did not know he was ineligible as an applicant he could not be guilty of fraud in making his application" might mislead the Court. It refers to the arbitrators' hyper-technical supplemental finding that respondent "did not know that he was ineligible as an *applicant*" (R. 199). That finding was thus explained by the arbitrators:

> "We assume anybody could apply for employment and would be eligible to seek the same. * * * While being eligible as an applicant, nevertheless under the rule enforced, he would be ineligible as an employe" (R. 201).

In other words, the finding that respondent did not know that he was ineligible as an *applicant*, did not mean that he did not know that he was ineligible as an *employe*. As to

the latter point, the finding was that respondent "understood that the defendant (petitioner) had a rule or practice against accepting men over 45 years of age" (R. 199). Of course, respondent's fraud did not consist solely in making his application containing false statements, but in obtaining employment on that basis.

It is respectfully submitted that the writ should be allowed.

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January, 1932.